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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYANT RODEZNO et al.,

Defendants and Appellants.

B234852

(Los Angeles County
Super. Ct. No. BA 361088)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Sam Ohta, Judge. Affirmed.

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant Bryant Rodezno.

Alan Fenster for Defendant and Appellant Ricardo Nava.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Herbert S. Tetef, Deputy Attorney General, for Plaintiff and Respondent.

SUMMARY

Defendants Bryant Rodezno and Ricardo Nava were convicted of the first degree murder of rival gang member Edwin Catalan, and firearm use and gang enhancements were found true. The convictions were supported by the testimony of an accomplice, who drove defendants to and from the crime scene, and by the testimony of an eyewitness.

Defendant Nava contends the prosecution engaged in “outrageous governmental conduct” by charging the accomplice with murder after she refused to testify at defendants’ preliminary hearing, and that he was deprived of effective assistance of counsel when his lawyer did not produce an expert witness on eyewitness identification. Defendant Rodezno joins in Nava’s argument that the accomplice’s testimony should have been excluded, and also contends the trial court erred when it instructed the jury, under CALCRIM No. 315, that they could consider the eyewitness’s level of certainty when evaluating his identification of defendants.

We find no merit in either defendant’s contentions and affirm the judgment.

FACTS

On August 22, 2007, Edwin Catalan, a member of the La Mirada Locos gang and known as “Drowsy,” was shot and killed outside a market on the corner of Fountain Avenue and Westmoreland Avenue in Los Angeles. Edward Eghiaian was standing on the sidewalk outside the market at the time, waiting for someone, and several other people, including the victim, were also standing outside the market. The victim’s mother was inside the market.

Eghiaian saw a man walking toward them holding a gun and wearing a hooded sweatshirt. Eghiaian could see his face. Eghiaian took cover behind the car he had been leaning on, and then saw the man shoot Catalan. He saw or heard five shots. He saw a second man walk up, yell something at Catalan, and kick him as he lay on the ground. The two men then ran toward Westmoreland; Eghiaian followed and saw them get into a double-parked white Suburban that sped away.

Another witness who worked in the market heard four or five shots and ran outside. He saw someone kick Catalan and say in Spanish, “ ‘You have problems, you son of a bitch.’ ” Someone who lived a half block from the market was sitting on his front porch when he heard

gunshots. He saw a white Suburban drive fast down Westmoreland. The driver had long hair and might have been a woman, and there were two male passengers. The police recovered six bullet casings at the scene, and the autopsy showed the victim suffered at least three gunshot wounds to his torso.

The lead investigator on the case, Detective Larry Burcher, recovered video footage from a nearby restaurant. It showed a person shooting Catalan and a second person kicking him, but the faces of the assailants could not be distinguished. The video footage (later shown to the jury) showed a white SUV with damage to its right rear passenger door making an abrupt turn onto Westmoreland shortly before the shooting.

The police were able to identify the vehicle as belonging to Stephanie Avilez-Gomez, a documented member of the White Fence gang in East Hollywood. About two weeks after the shooting, the police detained and questioned Gomez. She denied any involvement at first, but then admitted she was the driver. She identified defendant Rodezno as the shooter and a person named Carlos as the one who kicked Catalan. (Later, Gomez said “Carlos” was a name defendant Nava had used in the past to activate a cell phone, and that she misled the detectives about Nava’s name because she was afraid of him.)

The police released Gomez and continued their investigation.

According to Detective Burcher, eyewitness Eghiaian told him “it happened very fast and he saw them but he didn’t get a real good look at him, something along those lines.” On September 6, 2007, Burcher showed Eghiaian a six-pack photographic display including Rodezno’s photograph, but Eghiaian did not identify Rodezno. In January 2008, Eghiaian was shown a six-pack array including Nava’s photograph, but did not identify Nava.

In October 2007, Gomez was arrested at the border while smuggling 26 kilos of cocaine into the United States from Mexico for the White Fence gang. Gomez was charged by federal authorities with drug trafficking and agreed to cooperate in exchange for a 63-month term in federal prison. She also spoke with detectives handling the Catalan murder, repeating the information she had given earlier but this time identifying defendant Nava as the second assailant. Gomez signed an agreement to cooperate with the authorities in Los Angeles concerning any crimes she knew about, including the Catalan shooting.

On December 21 and 22, 2009, more than two years after the crime, a preliminary hearing was held. Eghiaian testified under subpoena at the preliminary hearing, and identified Rodezno as the shooter and Nava as the second assailant who kicked the victim. Both defendants were handcuffed and wearing prison clothes when Eghiaian identified them. Gomez appeared at the hearing, but refused to testify despite an immunity grant and was held in contempt. Defendants were held to answer for murder charges and related firearm and gang allegations.

On March 16, 2010, a grand jury indictment was filed accusing Rodezno, Nava and Gomez of Catalan's murder. Gomez then entered a manslaughter plea and agreed to testify against defendants in exchange for an 11-year sentence to run concurrently with her 63-month federal sentence.

The trial occurred in October 2010. Gomez testified to the facts she had given to the police in her several interviews. She and defendants were White Fence gang members and she was often the driver for gang members committing crimes. The White Fence gang believed that Drowsy from rival gang La Mirada Locos had killed a White Fence gang member, and they wanted to kill Drowsy. Gomez was with defendants and other White Fence gang members on the evening of the murder. She thought they were going on a "beer run" (stealing beer). Gomez and defendants got into Gomez's white Tahoe, and another gang member handed Rodezno a gun wrapped in a sweater. Defendants told Gomez where to drive and to turn on Westmoreland, in La Mirada Locos gang territory. Then Nava told Gomez to stop the car. She stopped in the middle of the street, defendants got out and crossed the street, Gomez heard gunshots, defendants ran back to the car and got in, Nava told Gomez to go (" '[g]o or it's your ass, too' "), and Gomez sped away.

Gomez testified that, as they drove away, defendant Rodezno said he shot a guy in the chest three times and tried to shoot him in the head, but the gun jammed or ran out of bullets. Defendant Nava said he had kicked the guy in the face. Both were excited and bragging. Nava asked Rodezno if they got the right person, and Rodezno said yes, that it was Drowsy from La Mirada. After the shooting, defendants urinated on their hands and then washed them

with laundry detergent; Rodezno had said in the past that he would do so to remove gunpowder.

Eghiaian testified, identifying Rodezno as the shooter and Nava as the person who kicked the victim. He testified that he “[got] a good look at [Rodezno’s] face,” described his facial features to the police, and described Nava to the police as bald, “kind of stocky and shorter than the other guy.” Eghiaian testified he was “a hundred percent certain” of his identification of the two men. He said that when he looked at the photographic lineups, the photos of the defendants looked similar to the assailants he saw, but he did not want to tell the detectives because he was not a hundred percent certain. He explained that looking at a photograph is different from looking at someone in person, and that the angles of the faces he was able to see “live” impacted his ability to make an identification: “The angles helped me. The angles make a big difference.” And: “The fact was that I saw them whole, in motion and walking, the face, the side. I didn’t—in the picture all you see is the front up to here (indicating) and a different color.”

A gang expert also testified, establishing the elements of the gang allegations.

After less than two hours of deliberation, the jury found both defendants guilty of first degree murder. As to Rodezno, the jury found true the allegation that he personally and intentionally discharged a firearm causing great bodily injury and death (and the two lesser enhancements for personal use and personal discharge of a firearm). (Pen. Code, § 12022.53, subds. (b), (c) & (d).) As to Nava, the jury found true the allegation that a principal personally and intentionally discharged a firearm causing great bodily injury and death (and the two lesser enhancements for a principal’s use and discharge of a firearm). (*Id.*, § 12022.53, subds. (b), (c), (d) & (e)(1).) In both cases, the jury found the murder was committed for the benefit of a criminal street gang. (*Id.*, § 186.22, subd. (b).)

Both defendants brought new trial motions. Nava’s family hired new counsel for him. Nava’s new trial motion included counsel’s declaration that Dr. Robert Shomer, an expert on eyewitness identification, was available to testify and was “particular[ly] interested” in the fact that Eghiaian could not identify Nava from the photo array but did so later, and would testify

that the identification was “definitely undermined” by Eghiaian’s having seen Nava’s photo in the photo array, but Nava could not afford Dr. Shomer’s fee.

The trial court denied motions for a new trial. In rejecting defendant Nava’s claim his trial counsel was ineffective for failing to call an eyewitness identification expert, the trial court said:

“Attacking the prosecution’s case . . . focused on attacking the credibility of Stephanie Gomez. As an accomplice, she testified to what she observed firsthand. In that sense, this was not a classic identity case.

“Mr. Eghiaian’s identification came into play from the perspective of corroboration. He was vigorously cross-examined about his identification. Both [defendants’ counsel] argued that Mr. Eghiaian’s identification was suspect.

“From the standpoint of strategy, it is understandable that an eyewitness identification expert was not called. That was not the main focus in the trial, rather, the focus was on attacking Miss Gomez’s credibility as a witness and further arguing that the corroborative identification was weak. . . . [A]n eyewitness identification expert cannot opine on whether or not the witness’ identification is, in fact, accurate [citing *People v. McDonald* (1984) 37 Cal.3d 351, disapproved on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914]—and, by the way, the *McDonald* case was Dr. Shomer, the very doctor that you had wanted to call for this motion for a new trial. It is understandable why the [expert] witness was not called. That person could not have taken the stand to say that Mr. Eghiaian’s identification was suspect, after all, the fact that the witness Mr. Eghiaian was not able to initially make an identification is of such a plain nature as evidence goes that it does not take an eyewitness identification expert to explain that the identification is suspect.

“As such, the defendant in my view has failed to establish step one on deficient performance, but even if it is found that the attorney was deficient, I do not believe prejudice would attach, precisely, again, because that expert would not be able to testify that Mr. Eghiaian’s identification is suspect.”

The court sentenced both defendants to 50 years to life in prison, consisting of 25 years to life for the murder plus 25 years to life for the most serious firearm enhancement. (Pen.

Code, § 12022.53, subds. (d) & (e)(1).) Sentences were imposed and stayed for the lesser firearm enhancements, and other orders were made that are not at issue on this appeal.

Defendants filed timely appeals.

DISCUSSION

Defendants make three assertions of error. None has merit.

1. The “Outrageous Governmental Conduct” Claim

Defendant Nava’s first contention, in which defendant Rodezno joins, is that Gomez’s testimony should be excluded on the ground of “outrageous governmental conduct” that violated his due process right to a fair trial. Nava contends it was “governmental misconduct to charge Ms. Gomez with murder only *after* she refused to testify at the preliminary hearing, and not because the Prosecution thought she was guilty of murder.” In other words, Gomez was “ ‘wrongly charged’ ” in order to compel her testimony, because if the prosecution really believed it had probable cause to charge her with murder (that she had the intent to commit murder), “it would not have waited years to bring a charge against her.”

Defendant’s argument is meritless. First, he did not object to Gomez’s testimony in the trial court, and thus forfeited the claim. (*People v. Williams* (2008) 43 Cal.4th 584, 620 [“ ‘ ‘questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal’ ’ ”].) Second, defendant’s premise is wrong. There was plainly probable cause to charge Gomez with murder; she drove defendants into rival gang territory knowing Rodezno was armed and drove them away after the shooting. Defendant’s conclusion that the delay in charging Gomez is necessarily attributable to the prosecution’s belief she had no intent to commit murder is mere speculation. The fact that she cooperated only after being charged does not support an inference of improper governmental conduct. And, no facts are offered to show Gomez’s testimony was unreliable. (Cf. *People v. Badgett* (1995) 10 Cal.4th 330, 348 [“Testimony of third parties that is offered at trial should not be subject to exclusion unless the defendant demonstrates that improper coercion has impaired the reliability of the testimony.”].)

2. Defendant Nava's Claim of Ineffective Assistance of Counsel

Defendant Nava contends his counsel provided ineffective assistance because counsel failed to present an expert witness to undermine the credibility of Eghiaian's identification. On this record we disagree.

A defendant challenging his conviction based on a claim of ineffective assistance of counsel must establish that counsel’s performance was deficient and that his defense was prejudiced by those deficiencies. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217; *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) The first element “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” (*Strickland*, at p. 687.) To satisfy the second element, the defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable” (*ibid.*)—or, as our Supreme Court has said, defendant must show “it is reasonably probable a more favorable determination would have resulted in the absence of counsel’s failings.” (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.)

When the record on appeal “ ‘ ‘ ‘ sheds no light on why counsel acted or failed to act in the manner challenged[,], . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,’ *the claim on appeal must be rejected.*’ [Citation.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 (*Mendoza Tello*), italics added; *People v. Jones* (2003) 29 Cal.4th 1229, 1254 [“In the usual case . . . we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel’s acts or omissions.”].) There is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ [Citation.]” (*Strickland, supra*, 466 U.S. at p. 689.)

Defendant has not satisfied either prong of the test. There is nothing in the record which illuminates the reasons behind counsel's decision not to engage an expert on

eyewitness identification, and this is not a case where “there simply could be no satisfactory explanation.” (*Mendoza Tello, supra*, 15 Cal.4th at p. 266.) While an expert on eyewitness identification may be used, when appropriate, to assist the jury in performing its task (*People v. Wright* (1988) 45 Cal.3d 1126, 1154), there is no requirement that defense counsel *must* use an expert in every eyewitness case. (Cf. *People v. McDonald, supra*, 37 Cal.3d at p. 377 [“[w]e expect that such evidence will not often be needed”].)

The rule is that “[w]hen an eyewitness identification of the defendant is a key element of the prosecution’s case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.” (*People v. McDonald, supra*, 37 Cal.3d at p. 377.) But *McDonald* “provides no support for the claim that expert testimony must be presented by a defense attorney in *every* case where an eyewitness identification is uncorroborated.” (*People v. Datt* (2010) 185 Cal.App.4th 942, 952.) And here, as the trial court effectively pointed out, the eyewitness identification *was* corroborated (albeit by accomplice testimony that itself required corroboration), so that this was “not a classic identity case.” Instead, Gomez’s testimony was the centerpiece of the prosecution’s case and of the defense’s attack on that case.

Further, nothing in the record on appeal (which is silent on whether or not trial counsel consulted an expert in the first place) shows that an expert would have given testimony that would have assisted the defense. Defendant did not present a declaration from Dr. Shomer (or from any other expert) as to what expert testimony might have been offered, and Dr. Shomer did not even review the case file.

Even if we were to give credence to counsel’s posttrial declaration that Dr. Shomer would testify that the identification was “definitely undermined” by Eghiaian’s previously having seen Nava’s photo in the photo array, defendant has not shown such vague testimony would have made a difference. Both counsel cross-examined Eghiaian

and argued vigorously that his identifications were suspect and unreliable, and they emphasized the very point in which counsel said Dr. Shomer was “interested.” Counsel also argued other factors, including that defendants were handcuffed and wearing prison clothes when Eghiaian identified them, more than two years after he failed to identify them from the photographic arrays.

In short, so far as the record shows, trial counsel may simply have concluded that he could effectively argue the factors affecting the reliability of Eghiaian’s identifications without expert testimony. Nothing in the record on appeal demonstrates this displayed an error “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” (*Strickland, supra*, 466 U.S. at p. 687; cf. *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 995 [“Expert testimony on the psychological factors affecting eyewitness identification is often unnecessary.”].)

Defendant Nava points out that Gomez’s testimony as an accomplice required corroboration, making it “particularly crucial” for trial counsel to undermine the accuracy of the eyewitness identification because that was the only corroborative testimony linking defendants to the crime. That may be so, but the fact remains that Nava has not shown that expert testimony would have made a difference. Gomez’s testimony was compelling, and Eghiaian’s testimony, even if it had been challenged by an expert, was legally sufficient to corroborate it. On this record, we see no reasonable possibility that the defendants would have obtained a more favorable result if the defense had presented expert testimony on the psychological factors that defendant Nava claims “could have affected the accuracy of [Eghiaian’s] identification.”

3. Defendant Rodezno’s Challenge to CALCRIM No. 315

The jury was instructed under CALCRIM No. 315 that, in evaluating the identification testimony, it should consider 15 questions, among them “ ‘[h]ow certain was the witness when he or she made an identification?’ ” At trial, Eghiaian testified that he was “a hundred percent certain” of his identification, and the prosecutor’s closing argument emphasized Eghiaian’s confidence in his identification.

Defendant Rodezno contends that CALCRIM No. 315 “erroneously, misleadingly, and unconstitutionally suggests that a more certain eyewitness is a more reliable one” He points to the Supreme Court’s statement in *McDonald* that “empirical research has undermined a number of widespread lay beliefs about the psychology of eyewitness identification, e.g., that the accuracy of a witness’s recollection increases with his certainty” (*McDonald, supra*, 37 Cal.3d at p. 362), and to other research discussed in *McDonald*. (*Id.* at p. 369 [noting among others a study that concluded “ ‘the eyewitness accuracy-confidence relationship is weak under good laboratory conditions and functionally useless in forensically representative settings’ ”].) Defendant also points to cases from other states questioning the validity of instructing the jury with the certainty factor, e.g. *Brodes v. State* (2005) 279 Ga. 435, 442 (“we can no longer endorse an instruction authorizing jurors to consider the witness’s certainty in his/her identification as a factor to be used in deciding the reliability of that identification”).

We reject defendant’s contention. CALCRIM No. 315 is a revised version of CALJIC No. 2.92, which defendant acknowledges was approved in *People v. Wright, supra*, 45 Cal.3d 1126, 1141, 1143 (“We hold that a proper instruction on eyewitness identification factors should focus the jury’s attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence[]”; and, “We conclude that the listing of factors to be considered by the jury will sufficiently bring to the jury’s attention the appropriate factors, and that an explanation of the *effects* of those factors is best left to argument by counsel, cross-examination of the eyewitness, and expert testimony where appropriate.”).

Subsequent cases have specifically rejected challenges to use of the certainty factor in CALJIC No. 2.92. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1230-1231 “[w]e have noted that CALJIC No. 2.92 normally provides sufficient guidance on the subject of eyewitness identification factors”; court rejected claim that, because of uncontradicted expert testimony that confidence in an identification does not positively correlate with its accuracy, it was error to instruct on the certainty factor]; *People v. Sullivan* (2007) 151

Cal.App.4th 524, 561-562 [rejecting claim of trial court error “by failing to delete sua sponte the reference to witness ‘certainty’ from the standard instruction (CALJIC No. 2.92)’”; *Wright* opinion expressly approved CALJIC No. 2.92 and “we therefore ‘reject defendant’s arguments and find no error in CALJIC No. 2.92’ as given with reference to degree of certainty as a factor is assessing the reliability of eyewitness identification testimony”].) The CALCRIM No. 315 instruction given in this case is indistinguishable in substance from the instruction approved in *Wright* and *Johnson*, and accordingly we find no error.

DISPOSITION

The judgment is affirmed.

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GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.